United States Court of Appeals

for the Second Circuit

APPENDIX

74-2023

ORIGINAL

United States Court of Appeals

For the Second Circuit.

SECURITIES & EXCHANGE COMMISSION,
Plaintiff-Appellee,

against

CAPITAL COUNSELLORS, INC., CAPITAL ADVISORS, INC., J. IRVING WEISS, ABRAHAM B. WEISS,
Defendants.

CONBOY, HEWITT, O'BRIEN & BOARDMAN,
Appellant,

SYDNEY B. WERTHEIMER,
Receiver-Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK.

APPENDIX.

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THE REPORTER COMPANY, INC., New York, N. Y. 10007—212 732-6978—1974

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Index to Appendix.

United States Court of Appeals

FOR THE SECOND CIRCUIT.

SECURITIES & EXCHANGE COMMISSION,

Plaintiff,

against

CAPITAL COUNSELLORS, INC., CAPITAL ADVISORS, INC., J. IRVING WEISS, ABRAHAM B. WEISS,

Defendants,

CONBOY, HEWITT, O'BRIEN & BOARDMAN,

Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK.

Relevant Docket Entries.

1971

June 11 Filed Opinion #37718. Cooper, J. This opinion constitutes our findings of fact and conclusions of law. * * * According the application for a preliminary injunction is granted. Settle Order Promptly On Notice. (mailed notice).

June 11 Filed order that Sydney B. Wertheimer be and hereby is appointed Receiver of all assets and property of and owned beneficially by defts' Capital Counsellors, and Capital Advisors. Said Receiver shall filed a bond in the amount of (50,000.00) Dollars. Cooper, J. M/N.

Relevant Docket Entries

Oct. 26 Filed Notice of Motion *re:* Application for Fees.

Nov. 12 Filed Affidavit in opposition to application for Preference and payment of fees. Also filed Memorandum in opposition to application for Preference and payment of fees. (by Conboy Hewitt)

Dec. 9 Filed Affidavit of service of two copies of affidavit and brief in opposition of application for payment of legal fees.

Dec. 22 Filed Sydney B. Wertheimer, Receiver's Affidavit.

Dec. 22 Filed Memorandum in support of the application of Conboy, Hewitt O'Brien & Boardman, Esqs. for a preference and Payment of legal fees.

Dec. 22 Filed Memorandum in opposition to the application of Conboy, Hewitt, O'Brien & Boardman, Esqs. for a preference and Payment of legal fees.

Dec. 22 Filed David J. Mountan, Jr. Affidavit in support of an application of Conboy, Hewitt, O'Brien, & Boardman for an order fixing fees.

Dec. 22 Filed Memo Endorsed on motion filed 10-26-71 —Oral argument on the application for counsel fees is set for January 11, 1972 at 4 p.m. in Room 706. The movant law firm, on or before the date of the oral argument, should declare in writing the allocation of their services and time, etc., as indicated. So Ordered. Cooper, J. M/N.

Opinion of Hon. Irving Ben Cooper, Appointing Sydney B. Wertheimer, Receiver

1974

May 22 Filed Opinion #40,730-Defts. motion for payment of legal fees from the assets of receivership estate is denied in all respects.—Cooper, J. Mailed notices.

July 22 Filed Defts. Notice of Appeal from order by Judge Cooper dated 5/22/74. (mailed notice)

Opinion of Hon. Irving Ben Cooper, Appointing Sydney B. Wertheimer, Receiver.

UNITED STATES DISTRICT COURT,

SOHTHERN DISTRICT OF NEW YORK.

SECURITIES & EXCHANGE COMMISSION,

Plaintiff,

against

CAPITAL COUNSELLORS, INC., CAPITAL ADVISORS, INC., J. IRVING WEISS, ABRAHAM B. WEISS,

Defendants.

71 Civ. 1390

Appearances:

Hon. Kevin Thomas Duffy, Regional Administrator, New York Regional Office, 26 Federal Plaza, New York, New York 10007, Attorney for Securities and Exchange Commission.

Opinion of Hon. Irving Ben Cooper, Appointing Sydney B. Wertheimer, Receiver

Donald N. Malawsky, Esq., Gerald Gordon, Esq., Roger M. Deitz, Esq., Paul V. Mifsud, Esq., Of Counsel.

Conboy, Hewitt, O'Brien & Boardman, Esqs., 20 Exchange Place, New York, New York 10005, Attorneys for Defendants.

Hobart L. Brinsmade, Esq., David J. Mountan, Jr., Esq., Myron D. Cohen, Esq., Of Counsel.

IRVING BEN COOPER, D. J.:

Plaintiff Securities and Exchange Commission instituted this action on March 25, 1971 by filing a complaint alleging numerous violations by the corporate and individual defendants of the Securities Act of 1933, the Securities Exchange Act of 1934, the Investment Advisers Act of 1940, and the rules and regulations enacted thereunder (Plaintiff's Complaint, March 25, 1971, p. 1-2); requesting the issuance of an injunction restraining defendants from participating in any manner in the marketing of securities subject to Section 5 of the Securities Act, and the appointment of a receiver to administer the corporate defendants' assets. (Complaint, pp. 14-23).

Contemporaneously, an order to show cause why a preliminary injunction should not issue, containing a comprehensive temporary restraining order, was entered by this Court. (Plaintiff's Order to Show Cause, Temporary Restraining Order and Affidavits, March 25, 1971). On April 2, 1971 all parties to this litigation consenting, and pending disposition of plaintiff's motion, we entered an order creating an interim arrangement with the goal of allowing defendants to continue operation of certain segments of its business without prejudice to the interests of the investing public involved in the disputed transactions. (Stipulation, Undertaking, and Order Modifying and Extending Temporary Restraining Order, April 2, 1971). That order was amended on April 8, 1971 and provided for substitution of the fiscal agent and designated an in-

dependent accountant. On May 7, 1971, an order was entered upon consent of all parties further modifying the prior court orders so as to provide a more workable interim arrangement. (Order Further Modifying and Supplementing Temporary Restraining Order, May 7, 1971).

Focusing on what we consider to be the threshold and most likely determinative issue of this litigation, the parties were directed to present evidence as to whether participation in defendants' Government Bond Plan constituted an investment contract subject to the registration provisions of the 1933 Act. Pursuant thereto hearings were held May 12, 13, 14, 17, 18, 19, 21, 1971 and on May 26, 1971 we endorsed the motion papers:

> "We have decided to grant plaintiff's application for a preliminary injunction and the appointment of a receiver. The Securities and Exchange Commission is directed to promptly submit on notice complete findings of fact and conclusions of law."

Plaintiff complied June 3, 1971, defendants on June 8, 1971.

Jurisdiction is based on Section 22(a) of the Securities Act 15 U.S.C. 77v(a), Section 27 of the Exchange Act, 15 U.S.C. 78aa, and Section 214 of the Advisers Act, 15 U.S.C. 80(b)-14.

This opinion constitutes our findings of fact and conclusions of law in accordance with Rule 52, F.R. Civ. P.

The parties involved

Capital Counsellors, Inc. ("Counsellors"), a Delaware corporation with offices located at 110 Wall Street, New York, New York, has been registered as a broker-dealer with the Commission since May 12, 1960 (Tr. 548)[1] and a

[1] "Tr." followed by a page reference relates to the hearing transcript.

member of the National Association of Securities Dealers, Inc. Counsellors oversees Capital Advisors Inc. and manages the Atlantic Fund for Investment in U. S. Government Securities, the Government Bond Plan and the Put and Call Program.

Capital Advisors, Inc. ("Advisors"), the alter ego of Counsellors, shares common office space, personnel and telephone service. It has been registered as an investment adviser with the Commission since January 7, 1962. (Tr. 548). Advisors publishes and sells to subscribers a semi-monthly bulletin entitled "Money and Credit Reports," also two books "The Money Squeeze" and "Final Stages of the Money Squeeze."

J. Irving Weiss ("Weiss"), the protagonist in this litigation is a founder, president and director of Counsellors and its subsidiaries, and owns a portion of the equity securities of Counselors.[2]

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[2]At the outset of their investigation, the Commission apparently believed, on the basis of the broker-dealer form filed by Counsellors, that stock of the corporate defendants was owned exclusively by the Weiss brothers. Weiss testified at the hearing that after spending over 40 years on the "street" (his first exposure to Wall Street in the summer of 1924 as a typist) (Tr. 545), he thought it was "normal" that a broker-dealer could have a "limited number of investors in a small company" without disclosing to the Commission this distribution of stock (Tr. 704-5). He maintained this position although admitting that he had completed a broker-dealer registration form for the SEC that requested information concerning stockholders, and that he was aware that any change in either operation or status would require amendment of the form. "Q. Did you put those 14 stockholders [in fact there were 'about 20' stockholders in Counsellors, and 'about 14' were not members of the Weiss family (Tr. 704)] in an amended registration form? A. I don't recall our doing that" (Tr. 705). Additionally, despite his familiarity with securities practice, he was allegedly unaware that a private placement necessarily involved sophisticated and wealthy investors (Tr. 565).

Opinion of Hon. Irving Ben Cooper, Appointing Sydney B. Wertheimer, Receiver

Abraham B. Weiss, Weiss' brother, was a vice-president and director of both Counsellors and Advisors and owned a percentage of the equity securities of Counsellors.[3]

The Government Bond Plan

The government bond plan, conceived by the Weiss brothers in February of 1967, combined the trading in government securities, treasury bills and long term government bonds with the anticipated fluctuation in interests to create a scheme for securing substantial profits. Individuals were solicited to invest $10,000 for a unit "participation" in the plan. Defendants deposited these funds in short term commercial paper until a large enough number of investors enlisted, at which point a two year loan was negotiated by Weiss' efforts for the group.[4] The loan proceeds and cash subscriptions were then combined in what Weiss denominated a "syndicate." Each participant assumed a fraction of the loan in the amount

[3]Although plaintiff initially contemplated calling Abraham Weiss as an adverse witness (Tr. 425), he did not testify at the hearing. The extent of his participation in the operation of the corporate defendants was never clearly established. However, Weiss acknowledged that his brother had "a major part in the start-up of the government bond plan" (Tr. 549), and constantly employed the term "we" to describe Counsellors' management (e. g., Tr. 551, 556).

[4]Originally, defendants secured the borrowing from savings and loan associations; at the request of the SEC, banks were substituted as the source for the loan (Tr. 736).

of $91,000,[5] and united with a portion of his initial investment,[6] defendants purchased for his account a 90 day $100,000 face value treasury bill. The treasury bill was immediately pledged as collateral for the loan and deposited in an escrow account. (Tr. 575). Throughout this phase of the plan, each participant suffered a diminution of his equity as the loan's interest exceeded the profit realized from the treasury bill.[7] As treasury bills matured, they were rolled over by defendants.

Weiss predicted in his promotional literature and lectures that in the very near future interests rates would

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[5]In 1967, each participant account was debited with a $95,000 obligation; the excess of the participant's investment not expended in the purchase of the $100,000 face value treasury bill was "transferred in the customer's margin account as a credit" (Tr. 757). In April 1968, at the Commission's suggestion, defendants reduced the portion of the loan reflected on each participant's balance sheet to $91,000 (Tr. 767). Under either arrangement, the participant's initial contribution was never fully invested, and the unused portion was applied to the differential between the interest due on the loan and the interest received from the treasury bill. After this balance of the participant's investment was exhausted, Weiss simply increased the amount of the loan to cover the cost of the interest differential (Tr. 768).

[6]$1,000 was immediately deducted from each unit of investment as compensation for defendants' services.

[7]Although the investors were aware of this interest differential at this stage of the plan (Tr. 68-9, 492-3), some relied on Weiss' prediction, contained in his Memorandum on United States Government securities ("Memorandum") (P. Exs. 1, 10, 11A, 22), defendants' primary promotional literature, that "we expect your three month Treasury bills to sail right through your balmy costs so that at a given point your return from Treasury bills will carry the cost from your loan" (Tr. 187), or assurance that the "most you should be paying the first year" is $690 (P. Ex. 19; Tr. 46, 81-2).

soar; this would create the proper market condition for defendants to advise the participants to transfer their holdings from treasury bills to depressed long term low interest bearing government bonds. Despite the widespread unavailability of credit during this chaotic situation, the earlier margin purchase of treasury bills insured each participant access to $100,000 to subsidize the acquisition of long term bonds. Thus the purchase of treasury bills, even at a net loss to the participant, was an integral part of the bond plan. The newly acquired long term government bonds would be substituted for the treasury bills as collateral for the loan.

Finally, Weiss had forecast a rapid retreat in interest rates which enhanced the value of the long term bonds. The participants were to realize substantial profits when the bonds would be sold after climbing in price in response to falling interest rates.

In all, defendants managed the marketing of some thirty-three (33) syndicates comprising over six hundred (600) public investors (Tr. 606) controlling some seventy (70) million dollars of treasury bills. (Tr. 596). In promoting the bond plan, defendants concededly employed the means and instrumentalities of interstate commerce and of the mails. (Tr. 589).

Investment Contract

Plaintiff contends that participation in the Government Bond Plan as outlined above and operated by defendants clearly constitutes a security as defined by Section 2(1) of the 1933 Act, 15 U.S.C. 77(b)1. Defendants resist this characterization in a two fold argument: (a) an essential element of an investment contract, the expectation of "profits solely from the efforts of the promotor" *SEC v. Howey*, 328 U. S. 293, 298-9 (1946), is absent inasmuch

as defendants merely advise the participants at the propitious moment to purchase long term bonds, the profit making phase of the plan (Tr. 953-5) and, (b) a no action letter of November 17, 1967 (P. Ex. 5) was issued by the Commission staff after reviewing with defendants the necessity for registration of the bond plan. (Tr. 956).[8] In disposing of the position thus advanced by defendants, for purposes of this motion we treat both arguments simultaneously, for we view the presentation of the plan, as relied upon by the Commission and which formed the basis of the no action letter, as not creating an investment contract. However, defendants deviation in a number of significant respects from this approved design both amply substantiates the presence of each element of an investment contract and pierces the protective shield of the no action letter.

Deviations from no action letter

1. *sophistication of investors*

In their initial written correspondence with the Commission, defendants' counsel represented that the "program is designed for sophisticated and wealthy investors able to invest in multiples of $10,000." (P. Ex. 4, September 25, 1967 letter, p. 1). Further, in that same letter,

[8]In 1967, after Capital Counsellors partnership commenced operation of the bond plan, the Commission requested Weiss to confer with their Washington staff as to "possible violation of the registration provisions under the Securities Act" (Tr. 558). As the plan operated at that time, the partnership had the discretion to transfer a participant's bills into bonds (Tr. 732). After a flurry of conversations, correspondence, and phone calls, defendants successfully sought a no action letter.

counsel stated that "Counsellors has individually negotiated and contracted with approximately 55 investors to date,[9] and well-to-do and sophisticated enough in money matters to realize the speculative risks, as well as the opportunities," and concluded that "the number and type of investors intended to be attracted thereby are not suitable subjects for regulation." (P. Ex. 4, p. 4). Weiss testified at the hearing that it is "still true" that the participants in the plan are all "well-to-do and sophisticated." (Tr. 570, 697).

Although we recognize that the five investors who testified at the hearing were called by the Commission,[10] we note that defendants failed to present any investor to counter our impression that by and large the participants in the bond plan did not possess either characteristic. Defendants acknowledge that one, Miss Beissner, could not afford the Government Bond Plan. (Tr. 701).[11] Weiss

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[9]In their letter of October 3, 1967, to the Commission, defendants emphasized that "In each case, the customer made a personal appointment with one of the Weiss brothers, talked the mechanics of the Program over * * *." (P. Ex. 39, p. 2).

[10]In fact, plaintiff conceded that some investors "are certified public accountants and may be attorneys" (Tr. 426). Plaintiff's proposal to offer a schedule of the investors was commendable (Tr. 426); however, no such document was introduced into evidence by either side.

[11]When questioned as to how witness Beissner was accepted as a participant, Weiss offered an unsatisfactory explanation that "she never asked me whether this was in line with her resources" (Tr. 701). Further, Weiss admitted that their promotional literature did not suggest a minimum level of resources as a prerequisite for safe participation in the plan (Tr. 702). In later testimony, Weiss sought to change his testimony and stated that "At the time [of investment] I assumed" she was a sophisticated investor. When pressed as to the basis of this assumption, Weiss failed to offer credible evidence to support his conclusion (Tr. 712-14).

characterized another investor witness as "sophisticated according to the information he gave me" (Tr. 702). He was referring to Mr. Rudin, a sixty-eight-year old part-time window cleaner with a level of formal education equivalent to "something like public school" (Tr. 445-6), who had amassed $60,000 in life savings at the time he entered the bond plan.[12] (Tr. 492). While we found Mr. Rudin extraordinarily alert and possessed of a keen mind, we consider his closing remarks enlightening on his business sophistication and acumen. "I am very confused. I get mixed up with figures and records and I can never remember. I don't remember when was even yesterday, not even." (Tr. 497).

These witnesses were apparently representative of the larger number of participants in the bond plan.[13] (Tr. 697-700). As to the "customer [having] a personal appointment with one of the Weiss brothers" (P. Ex. 39, p. 2), Weiss testified that this representation was no longer true, and further, that defendants never advised

[12]Witness Rudin testified that he accurately informed Weiss of his financial position prior to his entry into the plan (Tr. 494-5).

[13]Witness Horigan, before participating in the bond plan, in a letter to one of defendants' employees, Bush, director of marketing (Tr. 609), volunteered information as to his financial status (Tr. 143-5): "I am 80 years old and my income is dividends and interest on what funds we have. To go into your plan I will have to dispose of some of our holdings and sacrifice the income (with the hope of later making a capital gain, of course). So it will be a little time until I can get things lined up to go along with you, but hope to do so eventually" (P. Ex. 23). Other investors were less candid in depicting their financial status (Tr. 344-70).

the Commission in writing that they no longer intended to personally confer with every prospective investor.[14] (Tr. 605).

2. *management of government securities*

We view defendants' repeated representation that investors would have "the power to control the purchase and sale of the U.S. Government securities in the escrow account and thus the sole responsibility for management decision" (P. Ex. 4, September 25, 1967 letter, p. 3) as the critical factor leading to the Commission's issuance of the no action letter. (Tr. 889-92). We conclude that the participant in the bond plan, as operated by defendants, did not exercise "sole discretion" of management decision. (P. Ex. 5).

2a. *rollover of treasury bills*

In the initial holding phase of the program, defendants purchased three (3) month $100,000 face value treasury bills on behalf of each unit participant; concededly,[15] as

[14]In fact, of the 650 investors, the Weiss' personally spoke with only 200 (Tr. 606). Weiss, in a vague response maintained as to the other 450, "Either we spoke to them or our representatives, people in our organization talked to them, or we talked to them at seminars" (Tr. 607). Witness Beissner never spoke with anyone at Counsellors (Tr. 12), and apparently neither did witness Horigan (Tr. 180-1).

[15]Each investor was informed that defendants were rolling over treasury bills held in his account (e. g., Tr. 47-50). Defendants' promotional literature, the Memorandum in more recent editions specifically recited that "We roll over the Treasury Bills for you which you own" (P. Ex. 11A, p. 8). Of significance, the Memorandum submitted by defendants for review by the Commission did not include such a reference (P. Ex. 10; Tr. 649).

these treasury bills matured, reinvested the proceeds in similar treasury bills (rolling over) without contacting the participant or seeking his consent. (Tr. 555-7). This unilateral rolling over of treasury bills was contrary to the representations of defendants before the Commission, and accordingly inconsistent with the program as approved by the SEC in the no action letter.

The unequivocal language consistently appearing in defendants' correspondence,[16] clearly anticipates the individual participant's continuous administration over all phases of the plan—investor control of both treasury bills and long term government bonds.

In the letter of September 25, 1967, immediately after describing the assignment of a portion of the collateralized loan to the newly inducted syndicalist, defendants' counsel stated:

> *This effectively transfers to each investor the right to designate how and when U. S. Government securities placed in the bank escrow account are to be bought and sold.*[17] [italics in original]
>
> Advisors then suggests from time to time to each investor how he ought to purchase and sell the Government securities in his escrow account. (P. Ex. 4, September 25, 1967 letter, p. 2-3).

Defendants' counsel in the third letter of the trilogy stated:

> "Each customer, as before, would have the obligation to pay the bank loan rate on that portion

[16]These letters must be read in the context of what we find to be an endeavor by defendants to convince the Commission that a participation in the program did not constitute a security (Tr. 871).

[17]In our reading of this language and from the entire letter, we cannot find any indication or suggestion that this transfer of control over the pledged securities is not accomplished simultaneously with the participant's assumption of the loan.

> taken by him only, and would have the sole discretion (subject to the bank's right to call for more collateral) to buy and sell the securities pledged on that portion taken by him." (P. Ex. 40, p. 2).

The no action letter, confirms what we conclude was the understanding reached between the parties: that upon allocation of the secured loan,

> "Each customer would have the obligation to pay the bank loan rate on that portion allocated to him and would have the sole discretion subject to the banks right to call for more collateral, to buy and sell the securities pledged on that portion taken by him." (P. Ex. 5),

and that this discretion necessarily included investment decision over pledged treasury bills as well as long term bonds.[18]

We find unconvincing defendants' arguments that this apparently unambiguous language was in fact understood by the Commission as permitting defendants to exercise unilateral control over the purchase of treasury bills for customers' accounts. (Tr. 956). Although defendants admit that the specific term "roll over" never appeared in any literature or correspondence sent to the Commission (Tr. 576, 659), they contend that one piece of literature [an edition of the memorandum] accompanying two of the letters clearly reveals defendants' intention to roll over treasury bills. The Memorandum, exhibit D, to defend-

[18]Throughout the correspondence, defendants never limited the purported area of customer discretion specifically to long term bonds, but chose the term "Government securities" which by definition includes treasury bills and long term bonds (Tr. 866, 872-4).

ants' letter of October 3, 1967, in describing the plan's operation recites:

> "Only short term U. S. Treasury Bills will be purchased at this time, in preparation for Capital gains investment in long term Government Bonds . . . .
>
> In anticipation of a rise in interest rates, we will continue to own only U. S. Treasury Bills . . . .
>
> You will be notified when it is time to switch to long term bonds selling at lower prices." (P. Ex. 34, ex. D, p. 6)

Likewise, an identical Memorandum was attached to defendants' letter of October 31, 1967. (P. Ex. 40, ex. C, p. 6).

We cannot accept Weiss' testimony that this language "meant" that Counsellors would be rolling over treasury bills. (Tr. 743). The Memorandum's wording, when viewed in context of the letters to which they were attached as exhibits, cannot be reasonably interpreted as in any way varying the apparent representation contained in the letters that customers would control the transfer of all the pledged securities.[19] In fact, witness Chalmers, the attorney most closely associated with defendants in obtaining the no action letter, testified that this language "didn't imply anything one way or another, in my estimation" with respect to the rolling over of treasury bills. (Tr. 835-7).

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[19]Weiss also considered the statement appearing in the Memorandum that "when the decision is made to switch from short term United States treasury bills to the purchase of long term Government securities * * * you will be so advised.", as implying that no such advice would be offered as to treasury bills and accordingly disclosure had been made of the roll over feature (Tr. 656-8). Our opinion expressed above, is equally applicable here.

Opinion of Hon. Irving Ben Cooper, Appointing Sydney B. Wertheimer, Receiver

Defendants contend that in the course of describing the operation of the bond plan during the September 20 and 29, 1967 Washington meetings, [20] the SEC was specifically informed that one feature of the program was the unilateral roll over of treasury bills by Counsellors, (Tr. 576, 735-8); and that the SEC failed to register any objection to this aspect, but rather "in all conversations on the government bond plan. . . the assumption was taken that we were to roll over the treasury bills." (Tr. 626, 739).[21] We find this portion of the testimony particularly hollow.

In essence, defendants ask us to read the wording of the correspondence as relating exclusively to what they consider the central issue then in dispute, ("the crux of our whole operation" [Tr. 751]) the placing of participants into long-term government bonds—that defendants' representations extended only toward insuring the participant sole discretion in the decision to switch from short term treasury bills to long term government bonds.

We find defendants testimony unconvincing; we cannot construe the term "government securities," as used in the exchange of letters, to refer only to long-term bonds. (Tr. 633-4, 749). Weiss personally aided in the preparation of letters subsequent to these alleged statements, and never suggested substituting "bonds" for the word "securities," or correcting the impression that treasury bills were included within that term. (Tr. 563, 581-3). Further, de-

[20]Most particularly in a telephone conversation from the hall of the Commission building on September 29, 1967 (Tr. 627-8).

[21]Exhibit 38 reveals and both sides concede, that the subject of what would be done with treasury bills as they matured was discussed; however, it is unenlightening on the critical issue as to who would manage the reinvestment (Tr. 635). Likewise, the Commission's silence in May of 1970, in the course of an investigation into Counsellors' activities, is not evidence of their affirming defendants' right to roll over bills (Tr. 770-3).

fendants' contention that the purchase of "treasury bills represented no risk [to the subscribers] and [needed] no particular know how in doing these things. But just to keep cash." (Tr. 739, 645) is inapplicable to the bond plan arrangement where bills were purchased on margin and the resulting interest differential (which could continue for 2 years) substantially eroded the participant's investment.[22] (Tr. 684-5). Even assuming a non-leverage situation, the rolling over of treasury bills is not a simple ministerial act, but involves a choice as to maturity date (Tr. 577), which in turn, affects the return from the bill (Tr. 791-4)—in all, a selection from a variety of "60 or so" treasury bills. (Tr. 578).

Witness Chalmers was unable to "recall in detail" the description of the bond plan presented to the Commission's Washington staff, but recollected that the "essential features of the plan" were discussed. (Tr. 820). However, he did testify that "as far as[he] could recall" there was no objection voiced by the Commission to Counsellors rolling over the treasury bills (Tr. 827); that the only objection raised as to customer discretion related to the placing of the participant's investment into bonds. (Tr. 826-7). Although Chalmers acknowledged knowing that treasury bills were to be "rolled over without consultation with the participants" (Tr. 850), he was unable to offer a satisfactory explanation for the repeated choice of the term "U. S. Government securities" in describing the scope of customer discretion. (Tr. 880-88, 893-4).

[22]Throughout the operation of the bond plan participants' funds were only invested in treasury bills. Due to the cost of supporting the loans, of the original total investment of 6 1/2 million dollars, some 2 1/2 million dollars was lost (Tr. 717). We cannot agree with Weiss that the only risk, in the plan arose when participants funds were transferred into long term government bonds (Tr. 749A).

Further, Chalmers testified that on one occasion, the September 25th letter (P. Ex. 4, p. 2), the term "U. S. Government securities" included "all such Government securities," both bills and bonds. (Tr. 877).

Neither the testimony of Chalmers nor Weiss convinces us that we should disregard the plain meaning of the correspondence and interpret as the understanding of the parties that customer discretion first came into effect at the bond phase of the plan. To regard the term "U. S. Government securities," unambiguously appearing in correspondence between attorneys with extensive securities law expertise, as excluding treasury bills would require our creating a tortured definition[23] unsupported by the credible evidence before us.

2b. *purchase of long term government bonds*

Even assuming defendants successfully established that the rolling over of treasury bills was within the purview of the no action letter, and that such activity was simply a ministerial chore and not investment management, defendants overstepped the boundaries delineated for their participation in the projected second phase of the bond plan.

It is uncontested that the bond program, as described in conversations and correspondence (Tr. 627-8, 643) and presumably as operated by defendants (Tr. 647), envisaged the participant having "sole discretion to buy and sell the securities pledged on that portion taken by him." (P. Ex. 39, p. 2). Defendants' role was restricted

[23]Weiss definitions at trial: "Customers of Capital Counsellors" was defined as "anyone who buys anything from our organization" (Tr. 590). This definition would embrace 190,000 purchasers of "The Money Squeeze" and "The Final Stages of the Money Squeeze" (Tr. 592A). "Potential" meant the "possible profit," and did not include possible loss (Tr. 713-5).

to "In particular, Advisors would alert the investor to the favorable condition for purchases in a depressed long-term U. S. Government securities market when that favorable condition comes into existence." (P. Ex. 40, p. 2).

As part of the unconvincing September 29th phone call, Weiss allegedly requested further clarification as to whether defendants could acquire a power of attorney to purchase long term bonds on behalf of the participants.

> "And [*sic*] I to understand from the coversations we have had today that we can get a power of attorney from the customer to buy long term bonds?[24] And Mr. Sporkin said emphatically not." (Tr. 627-8).

Undeterred, Weiss, admittedly, in June 1970, requested and received permission from participants to transfer assets from treasury bills to long term bonds as to 40% of the unit investment.[25] (D. Ex. B, F, Tr. 639). The blanket authorization did not provide for a fixed date by which the transfer was to be accomplished, or in any way inhibit defendants' unfettered choice as to what bond to select. (Tr. 639). The fact that this authorization was never implemented is of slight significance. (Tr. 640).

Despite the Commission's clear warning to the contrary, and Weiss' conceded representation that as to this aspect of the bond plan the participant would exercise sole discretion, Weiss admitted that "We obtained their discretion. . . . We had it." (Tr. 640). Miss Beissner's sole discretion was transformed to defendants by their "share-[ing] some of that discretion with her." (Tr. 654).

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[24]We view this statement as manifesting the manner in which Weiss anticipated operating the bond plan.

[25]Defendants accepted a formal power of attorney from investor Levine (P. Ex. 37; Tr. 504), a well-traveled "free soul" who spent much of his time "out of town."

Opinion of Hon. Irving Ben Cooper, Appointing Sydney B. Wertheimer, Receiver

3. *broker dealer—investment contract*

In the letter of October 3, 1967, defendants' counsel sought to characterize the Government Bond Plan as equivalent to an ordinary broker's account and to distinguish the program from what traditionally would be considered as constituting a security.

> "I think we were in accord with the services rendered by Capital Counsellors in securing credit for the purchase of U. S. Government securities by customers and the services rendered by Capital Advisors, Inc. in suggesting to customers how to manage their accounts did not add up to the type of activity generally regarded as separating management from ownership and creating a 'security.' A 'security' is created when a customer turns over his money to Atlantic Fund for Investment in U. S. Government Securities, Inc. In that case, Advisors puts in the buy and sell orders and has overriding discretion as to how and when the underlying securities are to be sold. The Government Securities Program however, works like an ordinary broker's account. The customer puts in the buy and sell orders, accepting or disregarding the broker's advice. The only distinction between an ordinary broker's account and the Government Securities Program is that in the latter case, the securities involved are pledged with a bank for the account of a savings and loan institution, instead of pledged with a broker for the account of the bank putting up the money. In both cases, the broker goes out and arranges the credit for a group of his customers. In both cases, it is the customers who control the disposition of the pledged securities and

> who bear the ultimate responsibility for interest and principal payments." (P. Ex. 39, p. 4).

On the basis of the evidence before us, the bond plan participation was strikingly dissimilar to the traditional broker-customer relationship; in fact it created an investment contract.

Weiss admitted in the course of his testimony that the analogy was somewhat inaccurate (Tr. 678); the plan in "many respects" operated like an ordinary broker's account "except for rolling over the treasury bills." (Tr. 610). Despite what Weiss considered a significant variation, defendants were content to employ the broad term "securities" in describing the scope of customer discretion and omit this distinction in the contrast drawn in the October 3rd letter. In rolling over treasury bills, unlike the usual brokers account, the investor was never consulted (Tr. 617), nor did defendants promptly send a confirmation of sale. (Tr. 618).

Additionally, Weiss conceded that in an ordinary margin account, the investor "is locked in" only "Until he wants to get out." (Tr. 620). As the bond plan operated, each investor was in fact "locked in" to participate in the program for two years. (Tr. 620-4).

Counsellors' financial arrangement with the customer as to the amount of the loan to be assumed by each unit participant and secured by the pledge of the treasury bills, whether approved by the Commission or otherwise, was significantly dissimilar from the standard broker account. Defendants borrowed "on customers' securities more than is owing to them" (Tr. 676), and "borrow[ed] on customers' securities without informing them that their securities were going to be borrowed against." (Tr. 678).

Opinion of Hon. Irving Ben Cooper, Appointing Sydney B. Wertheimer, Receiver

Defendants, in their letter of September 25th, sought to delineate the "limited" benefits of the bond plan to the subscribing customer.

> "The investor is given two things and two things alone . . . (1) the opportunity to obtain money for the purchase of U. S. Government securities at a more favorable rate than that generally available and (2) investment advisory services in deciding how and when to buy and sell these securities." (P. Ex. 4, p. 2).

In fact, defendants offered the public an opportunity to invest money in a common enterprise with the expectation that they would earn large profits solely through defendants efforts. "Form was to be disregarded for substance and emphasis was placed upon economic reality." *SEC v. Howey, supra,* at 298. The subscriber had no active role in the management of his participation. Shortly after receipt of his investment, he was, often unknowingly (Tr. 43, 163, 458-62), locked into a sizable two year loan commitment and took no part in the purchase and roll over of treasury bills credited to his account and pledged as security for his loan. Few, if any, participants had any prior experience either with government securities other than E bonds (Tr. 42-3, 303, 464) or a sophisticated leverage investment. (Tr. 60, 178, 277, 489-90). Participants never saw the underlying loan agreement (Tr. 125) or treasury bill (Tr. 176-176A). Investor Rudin never even realized that he had assumed a loan; he thought that defendants borrowed money on his behalf and he was obligated to pay the interest as part of the cost of participation. (Tr. 456-7). Mr. Murdzak echoed this sentiment, and when confronted with the contract he signed (D. Ex. O) expressly reciting that he was "taking a portion of a loan," responded, "I felt it was just a paper that I had to sign in order to get into the bond

plan." (Tr. 309). Many, if not all, participants relied exclusively on Weiss' expertise[26] of trading in treasury bills and long term bonds (Tr. 112-3, 129-31, 184), and realization of profits.[27] (Tr. 23, 152, 453-4). Miss Beissner testified:

> "A. I was paying them to take care of my money.
>
> Q. How much were you paying them, Miss Beissner? A. I gave them a fee of $1,000.
>
> Q. What was your understanding of what that fee was supposed to be for? A. The fee was supposed to cover buying the Treasury bills until the bonds were low enough to buy, and then later disposing of the bonds and—well closing out the whole project.
>
> Q. Were you supposed to do anything, Miss Beissner, in connection with this plan? A. No. The $1,000 fee was supposed to have been the entire fee that it would cost me for their part in taking care of my plan. (Tr. 50-49, 130-1). (Transcript misnumbered).

Mr. Rudin testified:

> "I followed a hundred percent their advice." (Tr. 464).

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[26]Although Weiss testified that he "never considered myself to be an expert in anything," in response to the question, "Did your literature ever claim any expertise for you in Government securities?" he answered, "I assume it did." Weiss authored this promotional literature (Tr. 552).

[27]Separation of investment from control appears undeniable when in 1970, unknown to participants, some syndicates were closed because Weiss was unable to obtain loans (Tr. 720), of course, this precluded the purchase of treasury bills on margin (Tr. 720).

Opinion of Hon. Irving Ben Cooper, Appointing Sydney B. Wertheimer, Receiver

No evidence was adduced at trial that a single participant refused to consent to Weiss' "invasion" of his discretion or failed to authorize defendants' indiscriminate purchase of long term bonds for his account. Neither was there any evidence that in the three (3) years that the plan functioned, a single participant independently contacted defendants and gave instructions to transfer his funds to long-term bonds. If defendants are correct in summarizing the failure of the bond plan with "the market was missed" (Tr. 962) by Weiss, each and every investor in the Government Bond Plan shared the misfortune attendant that misjudgment in timing.

> "The Wtiness: I asked Mr. Weiss if he thought that by us giving him our savings he could do a better job with them than we could.
>
> Q. Did Mr. Weiss reply to you? A. Mr. Weiss said that he has been in this business for a long time and he felt that he was more competent at doing the right thing with our money than we would be." (Tr. 270).

§10(b) and §17(a) Fraud

Defendants' widespread promotional literature and correspondence were replete with false and misleading statements omitting or concealing the substantial risks a participant undertook in subscribing to the bond plan.

Induced by claims of 3 to 1 profits (Tr. 685), prospective investors were never alerted to the fact that defendants projections as to fluctuation in interest rates and trading prices of government securities were speculative and subject to human error (Tr. 690), that in fact such an error had occurred (Tr. 723-5), and a miscal-

culation could endanger their entire investment. (Tr. 684-5, 713-5). Although most participants were concerned with preserving assets (Tr. 181), defendants failed to adequately explain the dangers inherent in purchasing on margin. (Tr. 152).

Defendants' promotional "literature" by reciting that the investor "retains final control of the buy and sell decisions because you own the securities" misled investors into believing that they retained the option of withdrawing from the program. (Tr. 163, 462). Weiss confessed at trial that "some investors [were] told that they could cancel at will when they made their investment . . . some of these same investors [were] informed later that they could not cancel at will." (Tr. 708-9). Defendants occasionally permitted the withdrawal of a participant if a replacement was available to assume the departing investor's position. (Tr. 708). Defendants did not regard it necessary to inform the substitute that he was replacing a withdrawing subscriber; on at least one occasion, an individual was assigned to an existing syndicate as a replacement without being informed that, due to an intervening change in interest rates, his interest differential would be less if he were treated as a new subscriber to be placed in the most recent syndicate. (Tr. 709-11).

Over the past years, defendants' solicitation and correspondence foretold that the switch from bills to bonds was imminent. However, defendants failed to disclose to investors that they had been predicating this occurrence over a substantial period of time. (P. Ex. 44).

Defendants did disclose that while awaiting the purchase of long term bonds the interest differential would result in a net loss during the initial stage in the plan. However, in their Memorandum, defendants estimated a

present net annual cost at $1,075. Although Weiss told investors that he did not expect the differential to rise above 2%, undisclosed to subscribers was the fact that bill yields were steadily declining to less than 4% as interest rates of over 9% were required on loans in force. (Tr. 684). Under this circumstance, the annual cost of a participation would reach nearly 50% of the individual's investment.

Subscribers were led to believe that their $10,000 investment would complete their obligation for a unit participation in the bond plan. (Tr. 44). Defendants never advised investors that under the terms of some loan agreements, the margin requirement would be increased as bonds were substituted as collateral. (Tr. 604). If the investor were unable to supply these additional funds, he endangered the costly liquidity position he maintained during the first phase of the bond plan.

During the tight money market in January and February 1970, three syndicates were closed because defendants were unsuccessful in replacing expiring loans. Despite the critical feature of the leverage provided by these loans to the overall success of the bond plan, the affected investors were not immediately notified, and subsequent investors were never informed of, this episode or its potential reoccurrence. (Tr. 720-22).

Finally, investors were informed that $9,000 of their investment would be expended for the purchase of a $100,000 treasury bill and that the $91,000 balance would be the portion of the syndicate loan each would assume. (Ex. 1, p. 8). Participants were never informed that in fact treasury bills were purchased at a discount (Tr. 669), and if the full $9,000 was alloted to the purchase only $89,000 would need to be borrowed. (Tr. 672). Further, Weiss testified that unknown to investors this $2,000 sur-

plus[28] was deposited in banks and any interest earned was credited to Counsellor's account.[29] (Tr. 663-76).

Disposition

At this juncture of the litigation, this Court need not reach a final determination on the merits of the controversy, but merely resolve whether plaintiff has satisfied

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[28]Even assuming that this aspect of defendants' operation was approved by the Commission, recognizing that some portion of the investment would necessarily be maintained as free funds to pay the interest differential, investors were never accurately informed as to this procedure (Tr. 668).

[29]The evasive nature of Weiss' responses to questioning on this aspect was quite characteristic of his entire testimony.

> "Q. * * * [W]hat happened to the $2,000 additional that was borrowed. A. It was kept in the bank. Q. Was it earning any interest? A. At given times, no. Q. At other times, was it? A. At some times, it was" (Tr. 673).

When Weiss was questioned as to defendants' role in filling out questionnaires sent to participants by the SEC, the following colloquy occurred:

> "Q. When did you first see it? A. One of our clients came in with it or sent it to us and asked us to help him fill it out. Q. Did you fill out some of those things in blank yourself. A. There were one or two where we helped to fill out. Q. When you say you helped, did you stand over their shoulders while the investors filled them out? A. I think there were one or two that we assisted that way. Q. Were there others that were assisted in a different manner? A. There may have been."
>
> "* * * *"
>
> "Q. Did you suggest to the investors that they send it in to you? A. No sir, I did not. Q. Did someone at Capital Counsellors suggest that? A. I believe so. If they needed help."

its burden of establishing "a proper showing" of need for injunctive relief. *SEC v. Boren*, 283 F. 2d 312 (2d Cir. 1960); *SEC v. Broadwall Securites, Inc.*, 240 F. Supp. 962, 967 (S.D.N.Y. 1965). It has done exactly that. On the basis of the papers before us and the total hearing record, we conclude that under either statutory or common law standard, the Commission has squarely fulfilled its undertaking. Accordingly, its application for a preliminary injunction is granted.

From on or about January 1968, the defendants singly and in concert participated in the offer and sale of unregistered securities, as defined by Section 2(1) of the Securities Act, consisting of investment contracts in the defendants' Government Bond Plan. *SEC v. Howey, supra; SEC v. C. M. Joiner Leasing Corp.*, 320 U. S. 344, 352-3 (1943).

In the offer and sale of the Government Bond Plan: (a) persons invested money in a common enterprise and were led to expect profits solely from the efforts of the defendants, (b) persons invested in it because of economic inducements, (c) defendants provided management services, (d) the economic welfare of investors was inextricably woven with the ability of defendants to carry out this common enterprise for the benefit of those whose investments were solicited.

In the course of this sale of securities defendants: (a) failed to truthfully inform investors of the true costs and substantial risks of the Government Bond Plan, *S. E. C. v. Van Horn*, 371 F. 2d 181 (7th Cir. 1966); *Hughes v. S. E. C.*, 174 F. 2d 969 (D. C. Cir. 1949), (b) failed to deal fairly and honestly with their customers in the operation of the Government Bond Plan.

To prevent "diversion or waste of assets to the detriment of those for whose benefit, in some measure, this

injunctive action is brought" *SEC v. H. S. Simmons & Co.*, 190 F. Supp. 432 (S.D.N.Y. 1961), we consider it imperative to grant plaintiff's application for appointment of a receiver.[30] *Bellevee Gardens, Inc., v. Hill,* 297 F. 2d 185 (D. C. Cir. 1961); *Bailey v. Proctor,* 160 F. 2d 78 (1st Cir.) cert. denied, 331 U. S. 844 (1947). Sydney B. Wertheimer, Esq., 1501 Broadway, New York, New York is hereby appointed receiver.

Settle order promptly on notice.

New York, N. Y.
June 11, 1971

IRVING BEN COOPER
United States District Judge

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[30]We are constrained to note that defendants failed to observe the restrictions contained in the outstanding temporary restraining order and interim arrangement pending determination of this application (Tr. 694-7).

Notice of Motion of Conboy, Hewitt, O'Brien & Boardman, Dated October 25, 1971.

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

SECURITIES AND EXCHANGE COMMISSION,

Plaintiff,

against

CAPITAL COUNSELLORS, INC., CAPITAL ADVISORS, INC., J. IRVING WEISS, and ABRAHAM B. WEISS,

Defendants.

Civil Action File No. 71 Civ. 1390

SIRS:

Please Take Notice that the undersigned will bring the annexed motion on for hearing before Hon. Irving Ben Cooper, United States District Judge at Room 2904 of the United States Courthouse, Foley Square, Borough of Manhattan, City of New York, on the 9th day of November, 1971 at 10:30 o'clock in the forenoon of that day or as soon thereafter as counsel can be heard.

Dated, New York, New York
October 25, 1971

Yours etc.

CONBOY, HEWITT, O'BRIEN & BOARDMAN
By David J. Mountan, Jr.
Member of the Firm
Attorneys for Defendant
20 Exchange Place
New York, N. Y. 10005
DIgby 4-3131

Notice of Motion of Conboy, Hewitt, O'Brien & Boardman, Dated October 25, 1971

To:

Kevin Thomas Du[illegible], Esq.
Regional Administrator
Attorney for Securities
and Exchange Commission
26 Federal Plaza
New York, N. Y. 10007

Sydney B. Wertheimer, Esq.
Receiver for Capital Advisors, Inc.
and Capital Counsellors, Inc.
1501 Broadway
New York, N. Y. 10036

Application for Payment of Fees for Legal Services.

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

[SAME TITLE.]

Conboy, Hewitt, O'Brien & Boardman, attorneys for the Defendants in this action, hereby moves this Court:

1. That its claim against Capital Counsellors, Inc. in the amount of $10,000 for legal services rendered to such Corporation be granted preferred status against the assets of Capital Counsellors, Inc., and that the Receiver Sydney B. Wertheimer, Esq. be empowered and directed to pay to Conboy, Hewitt, O'Brien and Boardman, Esqs., for such legal services the sum of $10,000 on or before November 30, 1971; and

2. That its claim against Capital Advisors, Inc. in the amount of $10,000 for legal services rendered to such Corporation be granted preferred status against the assets of Capital Advisors, Inc. and that the Receiver Sydney B. Wertheimer, Esq. be empowered and directed to pay to Conboy, Hewitt, O'Brien & Boardman, Esqs. for such legal services the sum of $10,000 on or before November 30, 1971.

Dated: New York, N. Y.
October 25, 1971.

CONBOY, HEWITT, O'BRIEN & BOARDMAN
By David J. Mountan, Jr.
Member of the Firm
Attorneys for Defendant
20 Exchange Place
New York, N. Y. 10005
DIgby 4-3131

Affidavit of David J. Mountan, Jr., in Support of Application.

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

[SAME TITLE.]

State of New York,
County of New York, ss:

DAVID J. MOUNTAN, Jr., being duly sworn, deposes and says:

That he is an attorney and member of the firm of Conboy, Hewitt, O'Brien & Boardman, Esqs., attorneys for the Defendants in the above-entitled action.

That as appears from the affidavit of Hobart L. Brinsmade, which is annexed hereto and made a part hereof, Capital Counsellors, Inc. and Capital Advisors, Inc. have, for many years, been clients of Mr. Brinsmade, first when he was a member of the firm of Brinsmade & Schafrann, and continued to be his clients when he became a member of the firm of Conboy, Hewitt, O'Brien & Boardman, Esqs.

That as appears from Mr. Brinsmade's affidavit, Mr. J. Irving Weiss, as President and Chief Operating Officer of Capital Counsellors, Inc. and Capital Advisors, Inc., retained the firm of Conboy, Hewitt, O'Brien & Boardman generally, and that the firm was specifically employed by such companies in connection with the investigation made by the Securities and Exchange Commission (hereinafter SEC), and in connection with the subsequent litigation resulting from such investigation.

That your deponent as one of the litigating partners in the firm of Conboy, Hewitt, O'Brien & Boardman, was assigned as lead counsel in the investigation brought against Capital Counsellors, Inc. and Capital Advisors, Inc. and in the subsequent litigation which was brought

by the SEC against Capital Counsellors, Inc., Capital Advisors, Inc., J. Irving Weiss and Abraham B. Weiss, the latter two being President and Vice President, respectively, of the two corporate entities.

That in connection with the investigation made by the SEC into the operations of Counsellors and Advisors, the testimony of J. Irving Weiss was taken on December 29, 1970. In connection with such investigation, the testimony of William Swedlow, an employee, was taken on January 5, 1971; the testimony of Sherman Bush, Anne Purvin and Eve Weiss, employees, was taken on January 8, 1971; and the testimony of Abraham B. Weiss, Vice President of the corporate entities was taken on January 19, 1971. Your deponent appeared for and represented the corporate entities in connection with such hearings.

Subsequent to such hearings, there was frequent communication between the officers and employees of the corporate entities with this office.

Mr. Hobart L. Brinsmade, a partner of this firm, Mr. Myron D. Cohen, a partner of this firm and your deponent took an active part in this work.

In the afternoon of March 25, 1971, your deponent was advised that an application for a temporary restraining order would be made before Hon. John M. Cannella at his chambers that afternoon in connection with an action brought against Capital Counsellors Inc. and Capital Advisors, Inc., J. Irving Weiss and Abraham B. Weiss for an injunction restraining the Defendants from alleged violations of various sections of the Securities Act of 1933, the Securities Exchange Act of 1934 and the Investment Advisers Act of 1940. After hearing before Judge Cannella on the afternoon of March 25, 1971, Judge Cannella at 4:30 p. m. on that date issued a temporary restraining order. Your deponent appeared for and represented the Defendants at the hearing before Judge Cannella.

Affidavit of David J. Mountan, Jr., in Support of Application

On March 26, 1971, a further hearing was held before Judge Cannella at which your deponent represented the Defendants as a result of which Judge Cannella modified the restraining order to permit the corporate entities to meet their payrolls for the period covered by the payroll of March 26, 1971 and permitting the incurring of the costs for the mailing of "Money and Credit Reports" to the subscribers thereof on March 26, 1971.

Thereafter, on March 30, 1971, the motion of the SEC for a preliminary injunction regularly came on for hearing before Hon. Irving Ben Cooper, United States District Judge, at which time the motion for preliminary injunction was argued before Judge Cooper.

After hearing argument, a conference was held before Judge Cooper, as a result of which a stipulation was entered into after numerous and lengthy conferences between the attorneys for the SEC and your deponent, which provided a *modus operandi* pending the disposition of the motion for preliminary injunction. An order was entered on April 2, 1971 on the basis of said stipulation, appointing Arthur Andersen & Co. fiscal agent. That order was amended by an order of Judge Cooper of April 8, 1971 in which he vacated the appointment of Arthur Andersen & Co. as fiscal agent and appointed Sydney B. Wertheimer, Esq. as fiscal agent. In this same order of April 8, 1971, Judge Cooper appointed Haskins & Sells to conduct a certified audit.

Papers, consisting of affidavits and exhibits and a memorandum of law, were prepared in opposition to the Plaintiff's motion for a preliminary injunction and were served and filed. Thereafter, reply papers consisting of reply affidavits and exhibits and a reply memorandum of law were served on behalf of the Plaintiff.

In connection with the stipulation entered into between the parties, affidavits and orders were prepared permitting various payments to be made by the corporate Defendants.

Affidavit of David J. Mountan, Jr., in Support of Application

Thereafter, and as a result of numerous lengthy conferences between the fiscal agent for the corporate Defendants, the attorneys for the SEC and your deponent, a further order was signed by Judge Cooper on May 7, 1971 further modifying and supplementing the temporary restraining order of Judge Cannella.

Trial of this action commenced before Judge Cooper, without a jury, on May 12, 1971. Your deponent acted as lead counsel for the Defendants and Myron D. Cohen, Esq. assisted your deponent in the trial of this action on behalf of the Defendants. The trial continued on May 13, 14, 17, 18, 19 and 20, 1971.

Thereafter and on June 11, 1971, the Court rendered its opinion holding that the issuance of a preliminary injunction was warranted and appointing Sydney B. Wertheimer, Esq. the fiscal agent as receiver. On June 17, 1971, Judge Cooper signed the order of preliminary injunction.

In connection with the representation of the corporate Defendants in the hearings before the SEC on December 29, 1970 and in January, 1971, and in connection with representation of the corporate Defendants in the action brought by the SEC, your deponent's law firm spent over 400 hours, as more fully appears from the statement annexed hereto, made a part hereof, and marked Schedule A.

That it is respectfully submitted that the legal fees' of $10,000 for services rendered to Capital Counsellors, Inc. represents the reasonable value of the services of your deponent's law firm in this matter and were incurred in the defense in good faith and upon reasonable ground of Capital Counsellors, Inc. in the action brought against it by SEC and should be granted status as a preferred claim against the assets of Counsellors, now in the hands of Sydney B. Wertheimer, Esq. as receiver of such company.

Schedule A, Annexed to Affidavit of David J. Mountan, Jr.

That it is also respectfully submitted that the legal fees of $10,000 for services rendered to Capital Advisors Inc. represents the reasonable value of the services of your deponent's law firm in this matter and were incurred in the defense in good faith and upon reasonable ground of Capital Advisors Inc. in the action brought against it by SEC and should be granted status as a preferred claim against the assets of Advisors, now in the hands of Sydney B. Wertheimer, Esq. as receiver of such company.

That annexed hereto as an appendix is a list of some of the authorities on which we rely for the granting by the Court of the relief herein sought.

(Sworn to by David J. Mountan, Jr., October 25, 1971.)

Schedule A, Annexed to Affidavit of David J. Mountan, Jr.

(See opposite page.) ☞

SCHEDULE A

TIME DEVOTED TO THIS MATTER BY
CONBOY, HEWITT, O'BRIEN & BOARDMAN
THROUGH JUNE 17, 1971

Date		Hours
December 29, 1970	Attendance at SEC hearing at which testimony of J. Irving Weiss was taken. (DJM)	7
January 4, 1971	Conference with Messrs. J. Irving Weiss, Abraham B. Weiss and William Swedlow, and telephone calls. (HLB and DJM)	3
January 5, 1971	Preparation for and attendance at SEC hearing at which testimony of William Swedlow was taken. (HLB and DJM)	5-1/2
January 6, 1971	Telephone calls re hearing. (DJM)	1-1/2
January 7, 1971	Conferences with clients re SEC hearing and telephone calls. (DJM)	2-1/2
January 8, 1971	Attendance at SEC hearings at which testimony of Sherman Bush, Anne Purvin and Eve Weiss was taken. (DJM)	4-1/2
January 11, 1971	Review of testimony at SEC hearing and telephone calls. (HLB and DJM)	1-1/2
January 12, 1971	Review of testimony of SEC, telephone calls and review of papers. (HLB and DJM)	2-3/4
January 13, 14, 15 18, 1971	Conference with client and telephone calls. (DJM)	4-1/4
January 19, 1971	Attendance at SEC hearing at which testimony of Abraham B. Weiss was taken. (DJM)	2-1/2
January 20, 22, 28 29, 1971	Review of papers, conferences and telephone calls. (DJM)	4-1/4
February 1, 2, 3, 1971	Conference with client re Put and Call Program and telephone calls. (HLB and DJM)	7
February 11 and 24 1971	Conferences with client and telephone calls. (DJM)	2

Schedule A cont'd

Date		Hours
March 15, 1971	Telephone calls re hearing. (DJM)	1/2
March 25, 1971	Court appearances, conference, and review of papers. (DJM)	4
March 26, 1971	Preparation of papers, Court appearance, conferences and review of papers. (DJM)	7
March 27 and 28, 1971	Conferences with client. (DJM and MDC)	5
March 29, 1971	Conferences, preparation of papers and telephone calls.(DJM)	6
March 30, 1971	Court appearances and conferences.(DJM)	7
March 31, 1971	Conference with client. (DJM)	6
April 1, 1971	Conference with client. (DJM)	5
April 2, 1971	Court appearance and conferences. (DJM and MDC)	7
April 5, 1971	Conferences with client and preparation of affidavits in opposition to Motion for Preliminary Injunction. (HLB and MDC)	12
April 6, 1971	Preparation of affidavits and Memorandum of Law. (HLB and MDC)	13
April 7, 1971	Preparation of Affidavits. (MDC)	8-1/2
April 8, 1971	Preparation of affidavit and Memorandum of Law.(HLB and MDC)	11-1/2
April 9,1971	Preparation of affidavit. (MDC)	6-1/2
April 12, 1971	Conferences and review of documents and telephone calls. (HLB and MDC)	5
April 13, 1971	Conferences and research. (MDC)	3/4

Schedule A cont'd

Date		Hours
April 16, 1971	Conference with client. (MDC)	5
April 19, 1971	Conference with client and with Fiscal Agent and review of papers. (DJM and MDC)	6
April 20, 1971	Conference with client and review of papers. (HLB and DJM)	3-1/2
April 21, 1971	Review of papers and conferences (DJM and MDC)	3-1/2
April 22, 1971	Telephone conference. (DJM)	1/2
April 23, 1971	Conference with client. (DJM)	1-1/2
April 26, 1971	Preparation of papers. (DJM)	5
April 27, 28 and 30, 1971	Conferences and telephone calls. (DJM)	6-1/4
May 3, 4, 1971	Conferences and telephone calls. (DJM)	6-1/4
May 5, 1971	Court appearance and conferences (DJM)	7
May 6, 1971	Conferences and telephone calls (DJM)	6-1/2
May 7, 1971	Court appearance and conference.(DJM)	7-1/2
May 10, 1971	Preparation of papers, conference and telephone calls. (DJM and MDC)	10-1/2
May 11, 1971	Conferences and preparation for trial. (DJM)	10
May 12,1971	Trial and conferences. (DJM and MDC)	18
May 13, 1971	Trial.(DJM and MDC)	16
May 14, 1971	Trial. (DJM,EFB,MDC)	14
May 17,1971	Trial. (DJM and MDC)	15
May 18, 1971	Trial and research. (DJM and MDC)	20-1/2

Schedule A cont'd

Date		Hours
May 19, 1971	Trial. (DJM and MDC)	14
May 20, 1971	Conference and preparation for closing argument. (EFB and DJM)	3-1/2
May 21, 1971	Trial (DJM and MDC)	7
May 24, 1971	Conferences with client, review of papers and telephone calls. (HLB and DJM)	5-1/2
May 25, 26 and 27, 1971	Conference with client, review of papers and telephone calls. (HJB and DJM)	12-3/4
June 1, 1971	Review of papers and conferences. (DJM)	2-1/2
June 2, 3,1971	Conferences with client, review of papers and telephone calls. (HLB, DJM and MDC)	15-1/2
June 4, 1971	Review of papers, conferance and telephone calls (HLB and DJM)	5
June 7, 1971	Court appearance and conferences, review of papers. (HLB and DJM)	11-1/2
June 8, 1971	Preparation of Findings of Fact and Conclusions of Law. (HLB, DJM and MDC)	15-1/2
June 9, 1971	Conference with clients and telephone calls. (HLB and DJM)	6
June 10 and 11, 1971	Telephone calls.(DJM)	2-1/4
June 14,1971	Review of Court opinion and telephone conferences. (EFB and DJM)	4
June 15, 16 and 17, 1971	Conference and telephone calls, and review of papers. (HLB and DJM)	9
	Total	419-1/4

Appendix, Annexed to Affidavit of David J. Mountan, Jr.

Barnes v. Newcomb, 89 N. Y. 108;
Matter of Beha (Second Russian Ins. Co.), 136 Misc. 715 (Sup. Ct. N. Y. 1930);
Godley v. Crandall & Godley Co., 181 App. Div. 75, aff'd 227 N. Y. 656;
Pickrel, Schaeffer & Ebeling v. Merion, 66 N. E. 2d 273 (Court of Appeals of Ohio 1943);
McConnell v. All-Coverage Ins. Exch., 229 C. A. 2d 735; 40 Cal. Reptr. 587;
People v. Commonwealth Alliance L. Ins. Co., 148 N. Y. Rep. 563;
Lumbermen's Insurance Corporation v. State, 364 S. W. 2d 429 (Court of Civil Appeals of Texas —1963);
Robinson v. Mutual Reserve Life Ins. Co., 175 Fed. 624;
Robinson v. Mutual Reserve Life Ins. Co., 182 Fed. 850, aff'd 189 Fed. 347;
89 A.L.R. 1531 (Note).

Affidavit of Hobart L. Brinsmade in Support of Application.

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

[SAME TITLE.]

State of New York,
County of New York, ss:

HOBART L. BRINSMADE, being duly sworn, deposes and says:

1. I am an attorney and a member of the firm of Conboy, Hewitt, O'Brien & Boardman. Prior to March 1964 I was a member of the firm of Brinsmade & Schafrann.

2. The first business that I ever had with J. Irving Weiss took place in 1960 when he consulted me as to the manner in which he might market a portfolio of United States Government Securities. I advised him that this could only be done by an investment company licensed under the Investment Act of 1940.

3. Upon his request I incorporated the Atlantic Fund for Investment in United States Government Securities, Inc. and at the same time I incorporated Capital Counselors Inc. as a distributor of such Fund and Capital Advisors Inc. as an investment advisor of such Fund. Capital Counselors Inc. was licensed as a brokerage dealer under the Securities Exchange Act of 1934 and Capital Advisors Inc. was licensed as an investment adviser under the Investment Advisers Act.

4. Neither I nor any firm with which I have been associated have ever been retained or received any fees of any kind from Mr. Weiss personally. The services rendered the defendants in this action were rendered to and were to be paid for by Capital Counselors Inc. and Capital Advisors Inc.

(Sworn to by Hobart L. Brinsmade, October 25, 1971.)

Affidavit of Paul V. Misfud in Opposition to Application.

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

[SAME TITLE.]

State of New York,
County of New York, ss:

PAUL V. MIFSUD, being duly sworn, deposes and says:

1. I am employed by the Securities and Exchange Commission ("Commission") as an attorney in its New York Regional Office. I make this affidavit in opposition of the application for payment of $20,000 fees for legal services of Conboy, Hewitt, O'Brien & Boardman ("petitioner"), attorneys for Capital Counsellors, Inc. ("Counsellors") and Capital Advisors, Inc. ("Advisors"), together with J. Irving Weiss and Abraham B. Weiss (collectively referred to herein as "the Weisses"), defendants in this action.

2. I am familiar with the matters alleged in the Commission's complaint and have participated in the investigation and litigation of this matter. I have examined the Commission's public and private files concerning the defendants their attorneys and members of the public who had transactions with the Weisses.

3. On March 25, 1971, the Commission filed a motion for preliminary injunction against the individual defendants in this matter as well as against the corporate defendants, for whom a receiver was sought.

4. On June 11, 1971, this Court issued an opinion that the defendants had violated the registration and anti-fraud provisions of the Securities Act of 1933 and the anti-fraud provisions of the Securities Exchange Act of

Affidavit of Paul V. Misfud in Opposition to Application

1934. On June 17, 1971, an appropriate order was signed which also appointed a receiver for the corporate defendants.

5. I have participated in the interrogation of the individual defendants, their employees and others during the Commission's investigation and resulting litigation and have examined the transcripts of their testimony.

Representation of Individuals

6. During the course of the investigation and the resultant litigation, notwithstanding benefits bestowed by petitioner upon the corporate defendants, petitioner also represented various persons including the individual defendants in this matter as set out below.

7. In connection with the Commission's investigation of this matter, on December 29, 1970, J. Irving Weiss, appearing pursuant to subpoena before me at the Commission's New York Regional Office, participated in the following colloquy:

> (Mr. Mifsud) Q. Under the Commission's practice, you have a right to be represented by counsel of your own choosing.
>
> I note that you have counsel present.
>
> Do you wish Mr. Mountan to personally represent you?
>
> (Mr. Weiss) A. Yes.
>
> (Mr. Mifsud) Q. In addition, do you wish Mr. Mountan to represent Capital Counsellors as well? A. Yes.
>
> Q. Is the same true for Atlantic Fund for Investment in United States Government Securities and Capital Advisors? A. Yes.

Affidavit of Paul V. Misfud in Opposition to Application

8. In connection with the Commission's investigation of this matter, on January 5, 1971, William Swedlow, appearing pursuant to subpoena before me at the Commission's New York Regional Office, participated in the following colloquy:

> (Mr. Mifsud) Q. Under the Commission's practice you have a right to be represented by counsel of your choosing.
>
> I note that you have Mr. Mountan present.
>
> Do you wish Mr. Mountan to personally represent you?
>
> (Mr. Swedlow) A. Right.
>
> (Mr. Mifsud) Q. Does Mr. Mountan also represent Capital Counsellor and Capital Advisors?
>
> (Mr. Swedlow) A. Right.
>
> (Mr. Mifsud) Q. You are aware of that?
>
> (Mr. Swedlow) A. Right.

9. In connection with the Commission's investigation in the matter, on January 8, 1971, Eve Weiss, appearing pursuant to a subpoena before Roger M. Deitz, Esq. at the Commission's New York Regional Office, participated in the following colloquy:

> (Mr. Deitz) Q. Under the Commission's rules, you are permitted to be represented by an attorney of your own choosing.
>
> I note that Mr. Mountan is here.
>
> Is he representing you?
>
> (Miss Weiss) A. That's right, he is.

10. In connection with the Commission's investigation in this matter, on January 8, 1971, Sherman Bush, appearing pursuant to subpoena before Mr. Deitz at the Commission's New York Regional Office, participated in the following colloquy:

Affidavit of Paul V. Misfud in Opposition to Application

(Mr. Deitz) Q. Under the Commission's rules, you are permitted to be represented by an attorney of your own choosing.

(Mr. Bush) A. Yes.

(Mr. Deitz) Q. I note that Mr. Mountan is here. Is he representing you personally today?

(Mr. Bush) A. Yes.

11. In connection with the Commission's investigation in this matter, on January 8, 1971, Anne Purvin, appearing pursuant to subpoena before Mr. Deitz at the Commission's New York Regional Office, participated in the following colloquy:

(Mr. Deitz) Q. Under the Commission's rules, you are permitted to be represented by an attorney of your own choosing.

(Miss Purvin) A. Yes.

(Mr. Deitz) I will note for the record that Mr. Mountan is here.

Is he representing you here today?

(Miss Purvin) Q. Are you representing me as well?

(Mr. Mountan) A. Yes.

(Miss Purvin) A. Yes.

(Mr. Deitz) Would you answer loud enough so the reporter can hear you.

(Miss Purvin) A. Yes.

(Mr. Deitz) Thank you.

12. In connection with the Commission's investigation in this matter, on January 8, 1971, Abraham B. Weiss, appearing pursuant to subpoena before Mr. Deitz at the Commission's New York Regional Office, participated in the following colloquy:

(Mr. Deitz) Under the Commission's rules, you are permitted to be represented by an attorney of your own choosing.

Affidavit of Paul V. Misfud in Opposition to Application

I note Mr. Mountan is here today.
Is he representing you today?
(Mr. Weiss) A. He is.
(Mr. Deitz) Q. Is he also counsel for Capital Counsellors, Inc.?
(Mr. Weiss) A. He is.
(Mr. Deitz) Q. And Atlantic Fund for Investment in United States Government Securities?
(Mr. Weiss) A. He is.
(Mr. Deitz) Q. And Capital Advisors, Inc.?
(Mr. Weiss) A. He is.
(Mr. Deitz) Q. And for your brother J. Irving Weiss?
(Mr. Weiss) A. He is.

13. Paragraphs 7 through 12 above show that despite petitioner's claim that he represented Counsellors and Advisors during the Commission's investigation, he clearly acted in behalf of the six individuals as well.

14. As a result of the foregoing and without an apportionment by petitioner of benefits bestowed upon the corporations and individuals, the staff cannot ascertain which portion of the total fees claimed should be allowed to petitioner as general creditors.

15. The question of Mr. Mountan's representation of individuals described in paragraphs 7 through 12 above in this matter was also raised prior to and during the course of the Commission's investigation as I discussed with him the possibility of a conflict of interest between various individuals and corporations due to his role as personal attorney for them. Mr. Mountan assured me that in his opinion no conflicts existed between these individuals.

Affidavit of Paul V. Misfud in Opposition to Application

The Weisses Are Liable For the Fees

16. From April 2, 1971 until after the receiver was appointed, it was my understanding based upon representations by petitioner and various documents executed by petitioner, that petitioner would receive their legal fees for this litigation from the individual defendants as of March 25, 1971.

17. With reference to petitioner's affidavit wherein at pp. 3-4 the establishment of a *"Modus Operandi"* is related, he neglects to indicate that the central feature of the *Modus Operandi* established was that the individual defendants, not the corporate defendants, were to bear the costs of continued operations, including accounting and legal fees.

18. The April 2, 1971, Order of Judge Cooper included an indemnity account, along with certain offsetting accounts, which was to be funded by the individual defendants in order to:

> "indemnify the customers of the corporate defendants from any depletion of their securities, free credit balances and other assets in the hands of the defendants their officers, directors, agents, servants, employees, *attorneys*, successors and assigns, and those in active concert and participation with them, due to any act of the defendants as of 4:30 p. m. on March 25, 1971 * * *. For purposes of this Stipulation 'customers' shall not include creditors, * * *." (Italics added.)

19. Judge Cooper's Order of April 2, 1971, also provided that the fiscal agent was empowered to:

> "employ such accountants and attorneys and others as may be necessary in connection with the discharge of his duties above described * * *."

Affidavit of Paul V. Misfud in Opposition to Application

20. To my knowledge Sydney Wertheimer as fiscal agent never retained the services of Conboy, Hewitt, O'Brien & Boardman for Counsellors or Advisors at any period since March 25, 1971.

21. Judge Cooper's April 2, 1971, Order also provided that:

> "The corporate defendants may retain such employees as they deem necessary for office and other expenses provided that all expenses so incurred shall be paid for in full by the corporate defendants and shall in no way impair any funds owing to any public customers. All expenses herein shall be indemnified by deposits in the Indemnity Fund by the individual defendants J. Irving Weiss and Abraham B. Weiss."

22. Judge Cooper's April 2, 1971, Order was agreed to and signed by the petitioner.

23. The language quoted in paragraph 21 hereof was modified on May 7, 1971, by an Order of Judge Cooper consented to and signed by petitioner, to wit:

> "The corporate defendants may retain and pay such employees as they deem necessary, and disburse such funds as they deem necessary for office and other expenses, all provided, however, that (i) no such defendants may incur any expense, or make any disbursement, unless for an activity herein permitted to be conducted by it * * *."

24. Neither Judge Cooper's April 2, 1971, Order nor Judge Cooper's May 7, 1971, Order provide for the retention of counsel for the corporate defendants for the purpose of defending the corporate defendants against the appointment of a receiver.

Affidavit of Paul V. Misfud in Opposition to ***Application***

25. Based upon my observations and my intimate knowledge of the circumstances giving rise to the fees here requested, petitioner's efforts have from the first been exerted primarily at the direction of and for the benefit of the individual defendants.

26. Petitioner helped establish the *"Modus Operandi"* and often argued the point that the Weisses were personally bearing the cost of the litigation.

Factors Mitigating Against Any Decision on Fees at This Time

27. At this juncture there are many unresolved problems which make it impossible for the Commission to review the efficacy or reasonableness of petitioner's fees vis a vis the corporate defendants.

28. The individual defendants did not honor their obligations under either the April 2, 1971 or May 7, 1971, Order with respect to the maintenance of the indemnity account.

29. The petitioner has failed to demonstrate any benefit that it has bestowed upon the corporate defendants.

30. The petitioner's affidavit fails to apportion those services rendered on behalf of the individual defendants and the corporate defendants.

31. The petitioner has not produced any documentation or argument that the corporate and individual defendants should be jointly and severally liable for the legal fees in question.

32. As of this date the Commission has no knowledge that the creditors of the corporate defendants have been formally identified by the receiver or the extent of their claims established.

Reply Affidavit of David J. Mountan, Jr., in Support of Application

33. As of this date the Commission has no knowledge that the creditors of the corporate defendants have been notified of the instant application to afford them the opportunity to be heard.

34. Petitioner did not state, aside from citations to certain cases, why its claims for legal services incurred in the course of resisting the appointment of a receiver, should receive preferred status.

(Sworn to by Paul V. Mifsud, November 11, 1971.)

Reply Affidavit of David J. Mountan, Jr., in Support of Application.

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

[SAME TITLE.]

State of New York,
County of New York, ss:

DAVID J. MOUNTAN, Jr., being duly sworn, deposes and says:

1. That he is an attorney and member of the firm of Conboy, Hewitt, O'Brien & Boardman, Esqs. and makes this affidavit in support of an application of Conboy, Hewitt, O'Brien & Boardman for an order fixing their fees for services rendered to Capital Counsellors, Inc. (herein "Counsellors") and Capital Advisors, Inc. (herein "Advisors") between December 29, 1970 and June 17, 1971.

Reply Affidavit of David J. Mountan, Jr., in Support of Application

2. This affidavit is submitted in reply to the affidavit of Paul V. Mifsud, verified the 11th day of November, 1971, which was submitted in opposition to the application of Conboy, Hewitt, O'Brien & Boardman for the order fixing their fees for services.

3. Mr. Mifsud, at pages 2 through 5 of his affidavit questions the right of Conboy, Hewitt, O'Brien & Boardman to charge Counsellors and Advisors for the time spent at the hearings held on December 29, 1970 and on January 5 and 8, 1971 by claiming that some part of that time should be allocated and some part of the fee charged to the individuals whose testimony was then taken by the Securities and Exchange Commission in the Commission's investigation.

4. It is true that your deponent as a member of the firm of Conboy, Hewitt, O'Brien & Boardman represented the individuals when their testimony was taken by the Commission under subpoena as well as representing Counsellors and Advisors in such investigation. It must be borne in mind, however, that the individuals were represented because of their employment by Counsellors and Advisors and not for any other reason. Prior to each of the witnesses testifying, your deponent conferred with each witness and determined that the actions which they took on the matters which were the subject of investigation by the Securities and Exchange Commission were all taken within the scope of their authority as employees of Counsellors and Advisors.

5. Your deponent was convinced after conferring at length with each of the witnesses whose testimony was taken that there was no conflict of interest in your deponent's firm representing both the corporations, namely, Counsellors and Advisors, and the individuals who were served with subpoena in the investigation and so advised

the individuals. It was agreed that your deponent's firm would withdraw from the representation of any individual witness if a conflict of interest developed on the investigation. No such conflict appeared.

6. Your deponent appeared at the testimony to protect the interests both of Counsellors and Advisors and the individuals, employees of Counsellors and Advisors, as well. This representation was, your deponent believed and still believes, within the scope of the authorization given to your deponent's firm to render such services as might be necessary to protect Counsellors and Advisors in the investigation by the Securities and Exchange Commission, and it was understood that no fee for professional services would be charged to the individuals for such representation and no fee was charged.

7. Furthermore, Rule 7(b) of the Rules of the Securities and Exchange Commission relating to formal investigative proceedings provides that all witnesses shall be sequestered and unless permitted in the discretion of the officer conducting the investigation no witness or the counsel accompanying any such witness shall be permitted to be present during the examination of any other witness called in such proceeding. Rule 6 provides that a person submitting his testimony shall be entitled to procure a copy thereof. There is no provision giving any other person a right to obtain such transcript. It is your deponent's understanding that in such investigations the officer conducting the investigations rarely, if ever, exercises his discretion to permit interested parties to be present at such investigations. Unless, therefore, deponent's firm represented the witnesses being examined it would have no right to prevent improper testimony or to have any knowledge of what such testimony might be.

Reply Affidavit of David J. Mountan, Jr., in Support of Application

8. At pages 6 to 8, inclusive, of his affidavit, Mr. Mifsud alleges that it was his understanding "based upon representations by petitioner and various documents executed by petitioner, that petitioner would receive their legal fees for this litigation from the individual defendants as of March 25, 1971."

9. In the afternoon of March 25, 1971, your deponent was advised by telephone that an application for a temporary restraining order would be made before Hon. John M. Cannella, United States District Judge, at his chambers that afternoon in connection with this case. Your deponent appeared and represented Counsellors and Advisors and the Weisses, officers of Counsellors and Advisors. No objection was taken by the Court or by the attorneys for the Securities and Exchange Commission to such representation. Your deponent again appeared before Judge Cannella in connection with this matter on March 26, 1971. The main purpose of this hearing was to permit the corporate defendants, Counsellors and Advisors, to pay the wages of their employees, and to permit the corporate defendants to incur the cost of mailing the Money and Credit Reports to their subscribers on March 26, 1971.

10. The order to show cause signed by Judge Cannella on March 25, 1971 was returnable before Hon. Irving Ben Cooper, United States District Judge, on March 30, 1971. On the return date, your deponent on behalf of defendants sought to amend the temporary restraining order to permit, *inter alia*, the defendants to pay from their funds the normal expenses of their business, such as payrolls, rent and attorneys' fees. An affidavit of William Swedlow, controller of Counsellors, was submitted to the Court at that time, to which was attached an unaudited balance sheet showing the net capital position of Counsellors as of December 31, 1970, which balance sheet showed Counsellors to be in proper net capital position.

Reply Affidavit of David J. Mountan, Jr., in Support of Application

11. On April 2, 1971 a stipulation was entered into between the defendants, your deponent as counsel for the defendants and Kevin Thomas Duffy, Esq., as counsel for the plaintiff providing a *modus operandi* pending the determination of plaintiff's motion for a preliminary injunction. This stipulation was so ordered by Judge Cooper at 3:30 P. M. on April 2. The main purpose of this stipulation was the appointment of a fiscal agent to cancel all loans pertaining to the Government Bond Plan and to collect the moneys remaining after applying the proceeds of the sale of Treasury Bills against the loans which they collateralized. The stipulation envisioned the continuation of the business of the corporate defendants, Counsellors and Advisors, in a limited way, and further envisioned that the corporate defendants would continue to defend the litigation by their attorneys until the final disposition by the Court of plaintiff's motion for a preliminary injunction.

12. Provision was made in Judge Cooper's order of April 2 for the setting up of an indemnity account, the funds of which were to be obtained from the personal assets of the individual defendants to take care of any payments by the corporate defendants pending the disposition of the motion for preliminary injunction over and above what was taken in by the corporate defendants through the sale of lists, handling Atlantic Fund and the accrued fees from the sale of Money and Credit Reports.

13. Nowhere in the stipulation was there any intention to prevent the corporate defendants from defending themselves in this litigation and from incurring attorneys' fees for such defense. Granted, such fees could not be paid, pending a final disposition of the motion for preliminary injunction. The further order of Judge Cooper of May 7, 1971 in no way changed this.

Reply Affidavit of David J. Mountan, Jr., in Support of Application

14. It must be borne in mind that neither of the individual defendants was either an investment advisor or a broker-dealer. Counsellors was a licensed broker-dealer and Advisors was a licensed investment advisor. The defendants and their counsel well knew that if an injunction was granted against the corporate defendants, they would automatically have to sever their relationship with Atlantic Fund and that in all probability administrative proceedings would be brought to revoke their licenses. It was important, therefore, that their interests be vigorously defended in this action for injunctive relief and such defense was, in complete good faith, undertaken.

15. A lengthy trial ensued before Judge Cooper on May 12, 13, 14, 17, 18, 19 and 20, 1971 at which the corporate defendants were represented by your deponent's firm. At no time did anyone ever question that the corporate defendants had the right to such representation or that the corporate defendants were not liable to pay for the services of your deponent's firm.

16. As a matter of fact, at the hearing before Judge Cooper on June 7, 1971, your deponent, at pages 6 and 7 of the transcript pointed out to the Court that our fees for the litigation totaled approximately $20,000 and that we intended to submit bills (thereafter submitted) to Counsellors and Advisors for the legal services performed for them. At that hearing, attended by the attorneys for the Securities and Exchange Commission, as well as by Mr. Wertheimer, Fiscal Agent, no voice was raised that this firm was not entitled to the status of a creditor against Counsellors and Advisors.

17. It must also be borne in mind, as appears at page 13 of the transcript of the hearing before Judge Cooper on May 7, 1971, that the main issue to be litigated at the trial was the issue of whether or not the defendants in

the operation of the Bond Plan were selling unregistered securities in violation of law. The evidence presented by the defendants at the trial, for the main, was restricted to such issue. The defendants' evidence on this issue was substantial. Certainly, it goes without saying that it was important for the corporate defendants to vigorously contest this issue to preserve the corporate assets against possible further lawsuits.

18. At the various conferences held before the trial, the defendants were represented by your deponent as counsel. At the trial before Judge Cooper, your deponent acted as lead counsel and was assisted by his partner, Myron D. Cohen. As far as your deponent has been able to ascertain, the only members or associates of this firm who had dealings with Mr. Mifsud from March 25, 1971 until the present time were Mr. Cohen and myself. At no time did your deponent ever represent to Mr. Mifsud that Conboy, Hewitt, O'Brien & Boardman would not look to Counsellors and Advisors for their legal fees for representing such corporations in the investigation by the Securities and Exchange Commission and in the subsequent litigation brought by the Commission. I have discussed this matter with Mr. Cohen and he assures me that he made no such representation.

(Sworn to by David J. Mountan, Jr., November 24, 1971.)

Reply Affidavit of Hobart L. Brinsmade in Support of Application.

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

[SAME TITLE.]

State of New York,
County of New York, ss:

HOBART L. BRINSMADE, being duly sworn, deposes and says:

1. That he is an attorney and counsellor-at-law and member of the firm of Conboy, Hewitt, O'Brien & Boardman. Prior to 1964 he was a member of the firm of Brinsmade & Schafrann.

2. This Affidavit is made in support of an application of Conboy, Hewitt, O'Brien & Boardman for an order fixing their fees for services rendered to Capital Counsellors, Inc. (herein "Counsellors") and Capital Advisors, Inc. (herein "Advisors") between December 29, 1970 and June 27, 1971.

3. The first time deponent was consulted by either Mr. J. Irving Weiss or his brother, Mr. Abraham B. Weiss, as to legal services was in the latter part of 1959 or early 1960. At that time Mr. J. Irving Weiss inquired as to the possibility of organizing an investment trust for public sale under the Investment Company Act of 1940 which would be limited to investment in United States Government securities. Your deponent advised Mr. Weiss that no registered investment company could make a public offering of its securities unless it had a net worth of at least $100,000 and that in order to organize such a trust such funds would have to be obtained. Mr. Weiss advised your deponent that he did not have assets sufficient to supply such funds but would have to obtain them privately from

others. He also made it clear that deponent's fees would have to be paid out of the enterprise and would not be borne by him or his brother personally.

4. Thereafter, deponent caused to be organized Atlantic Fund for Investment in United States Government Securities, Inc. (herein "Atlantic Fund"), registered its shares for public sale with the Securities and Exchange Commission and in connection therewith organized Counsellors to act as the underwriter of such offering and Advisors to act as the investment advisor of Atlantic Fund. Your deponent was advis d at the time by Mr. Weiss and his brother, Abraham B. Weiss, that they were transferring substantially all of their personal assets to Counsellors in consideration of its stock.

5. The fee for such service was billed to and paid by Counsellors and Advisors. Due to the lack of funds the major portion of such fee was not paid until 1968.

6. After 1960 Brinsmade & Schafrann, and later Conboy, Hewitt, O'Brien & Boardman, had an arrangement with Counsellors for a monthly retainer to cover advice with respect to these companies which were billed to and paid by them. The monthly retainer for October, November and December, 1970 and January, 1971 was paid out of the escrow account set up under the order of April 2, 1971 with the consent of the Fiscal Agent on June 8, 1971 as a proper charge against Counsellors and Advisors.

7. In April, 1970 Paul V. Mifsud, an attorney for the Securities and Exchange Commission, called your deponent and stated that in order to make an intelligent investigation of the books and records of Counsellors and Advisors, he required the presence of the companies' auditor to explain what the entries in the books signified. At Mr. Mifsud's requests your deponent went to the Securities and Exchange Commission with Mr. William Swedlow, a cer-

tified public accountant and an employee of Counsellors. The services rendered on this occasion were billed and paid for by Counsellors and Advisors. No fee was charged for representing William Swedlow individually.

8. On or about December 16, 1970 the Commission issued an order of investigation into whether Counsellors and Advisors and certain of their employees had violated various sections of law involving securities and shortly thereafter issued and served subpoenas upon Counsellors, Advisors and various of their employees as individuals. At that time your deponent spoke with Mr. J. Irving Weiss and advised him that such investigation could lead to an injunction proceeding against Counsellors and Advisors, the appointment of a receiver and might ultimately lead to the revocation of the licenses held by Counsellors as a broker-dealer under the Securities Exchange Act of 1934 and the license held by Advisors as an investment advisor under the Investment Advisor Act. Mr. Weiss, as president of Counsellors and Advisors, requested your deponent to render such services as might be necessary to protect defendants Counsellors and Advisors from such sanctions, it being understood that deponent's firm would be paid the reasonable value of the services so to be rendered. This agreement made in December, 1970 was never thereafter modified or cancelled and is still in full force and effect.

9. On or about November 9, 1971 your deponent was consulted by Mr. J. Irving Weiss and Mr. Abraham B. Weiss as to whether or not deponent's firm would represent them individually in the administrative proceedings which the Securities and Exchange Commission had begun against them to bar them from employment by any broker-dealer or investment advisor. Your deponent was advised that neither of them had any funds nor any prospect of funds which could be used for such purpose. They also

advised your deponent that the funds which were used to maintain the escrow account pursuant to the order of April 2, 1971 had been borrowed by them and they were unable to repay the amounts so borrowed.

(Sworn to by Hobart L. Brinsmade, November 24, 1971.)

Affidavit of Sydney B. Wertheimer in Opposition to Application.

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

[SAME TITLE.]

State of New York,
County of New York, ss:

SYDNEY B. WERTHEIMER, being duly sworn, deposes and says:

1. I was appointed Receiver of all assets and property of and owned beneficially or otherwise by defendants Capital Counsellors, Inc. and Capital Advisors, Inc. I duly qualified in that capacity.

2. This affidavit is made to set forth my position with respect to the application of Conboy, Hewitt, O'Brien & Boardman for payment of legal fees by the corporate defendants.

3. I respectfully disagree with the position of the Securities and Exchange Commission ("Commission"), that attorneys who represent the corporate defendants in proceedings brought against them by the Commission are

not entitled to be paid out of corporate funds. It would be an injustice not to permit such corporations adequately to defend themselves, albeit the charges are ultimately sustained and a receiver is appointed for their assets. It would be difficult for corporations thus charged to obtain competent counsel unless the latter are assured of being paid regardless of the outcome. The fact that the corporations are ultimately found guilty of the charges may properly enter into valuation of the attorneys' services, and therefore warrant a lesser amount than would be payable if the corporations be successful, but, in my opinion, should not preclude all payment.

4. I do agree with the position of the Commission that the attorneys are not entitled to be paid by the corporations for services rendered to the individual defendants, J. Irving Weiss and Abraham B. Weiss, or to the individuals who appeared as witnesses before the Commission pursuant to subpoena: Eve Weiss, Swedlow, Purvis and Bush. The attorneys should be required to specify exactly what services were rendered to the two corporate defendants, and the exact time devoted thereto.

5. The affidavit of Mr. Mountan shows that, of the total of 400 hours spent, 60 were spent prior to the appointment of the Fiscal Agent on March 27, 1971. I have been advised by counsel that, to the extent that such services were rendered to the corporations and distinguished from the individuals, they merely constitute a claim against the corporations, and cannot be treated as an administration expense. This portion of the application should therefore be deferred until proofs of claim are filed. Further, it is urged that this portion of the claim is not entitled to a preferred status.

(Sworn to by Sydney B. Wertheimer, December 14, 1971.)

Memorandum-Order of Hon. Irving Ben Cooper, Dated December 21, 1971, Ordering Movant Law Firm to Declare Allocation of Services.

SEC v. Capital Counsellors, Inc., et al.—71 Civ. 1390

Oral argument on the application for counsel fees is set for January 11, 1972 at 4 p. m. in Room 706.

While the following information sought by the Court may ultimately be given significant weight or accorded little consideration or even discarded, the movant law firm, on or before the date of the oral argument, should declare in writing the allocation of their services and time (a) between the periods prior to March 27 and the period subsequent thereto; (b) as to the period subsequent to March 27, the services rendered to Capital Counsellors, Capital Advisors, individual defendants and individual witnesses.

We are prompted to request this data in view of the contentions made by the Securities and Exchange Commission and the Receiver.

So Ordered:

New York, N. Y.
December 21, 1971

IRVING BEN COOPER
U. S. D. J.

Letter, Addressed to Hon. Irving Ben Cooper by David J. Mountan, Jr., Dated January 4, 1972.

January 4, 1972

Hon. Irving Ben Cooper
United States District Judge
United States Courthouse
Foley Square
New York, N. Y. 10007

Re: Securities and Exchange Commission v. Capital Counsellors, Inc., *et al.*

Dear Judge Cooper:

This letter is written to you in accordance with the direction contained in your order of December 21, 1971 that this firm should declare in writing the allocation of their services and time (a) between the period prior to March 27, 1971 and the period subsequent thereto; and (b) as to the period subsequent to March 27, 1971, the services rendered to Capital Counsellors, Inc., Capital Advisors, Inc., individual defendants and individual witnesses.

As to the allocation of our services and time between the period prior to March 27, and the period subsequent thereto, Your Honor is respectfully referred to Schedule A attached to the original notice of motion, dated October 25, 1971. Specifically, the number of hours spent by your deponent's firm prior to March 27, 1971 comes to 59¾ hours.

As to the period subsequent to March 27, 1971, no service was rendered to any individual witness. Subsequent to March 27, 1971, all of the time spent by this firm was in connection with the action brought by the Securities and Exchange Commission against the two corporate defendants and the two individual defendants, officers of the corporate defendants. As appears from page 3 of the affidavit of Hobart L. Brinsmade, verified November 24, 1971,

Letter, Addressed to Hon. Irving Ben Cooper by David J. Mountan, Jr., Dated January 4, 1972

this firm was requested by Mr. J. Irving Weiss, as President of Counsellors and Advisors to render such services as might be necessary to protect Counsellors and Advisors in any action brought against them by the SEC for injunction, the appointment of a Receiver or for sanctions and no services were rendered additional to what was so required.

Respectfully submitted,

DAVID J. MOUNTAN, JR.

DJM, JR.:F

CC: Kevin Thomas Duffy, Esq.
Regional Administrator
Attorney for Securities and
Exchange Commission
26 Federal Plaza
New York, N. Y. 10007

Leon Leighton, Esq.
Attorney for Sydney B. Wertheimer
Receiver
6 E. 45th Street
New York, N. Y. 10007

Opinion and Order 40,730 of Judge Cooper Denying Application for Counsel Fees, Dated May 22, 1974.

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

[SAME TITLE.]

Appearances:

Hon. William D. Moran, Regional Administrator, Securities and Exchange Commission, 26 Federal Plaza, New York, New York 10007, Attorney for Plaintiff, Roger M. Deitz, Esq., Of Counsel.

Leon Leighton, Esq., 6 East 45th Street, New York, New York 10017, Attorney for Receiver.

Conboy, Hewitt, O'Brien & Boardman, Esqs., 20 Exchange Place, New York, New York 10005, Attorneys for Defendants, David J. Mountan, Jr., Esq., Of Counsel.

IRVING BEN COOPER, D. J.:

We have before us a motion by defendants' attorneys, Conboy, Hewitt, O'Brien and Boardman, Esqs., for payment of $20,000 in legal fees out of the assets of Capital Counsellors, Inc. and Capital Advisors, Inc. (hereafter "Counsellors" and "Advisors") which comprise the receivership estate. The motion is opposed by the Receiver as well as the Securities and Exchange Commission (hereafter "SEC") on the ground that the desired relief would impose an unfair burden upon public investors who have already suffered substantial losses as a result of defendants' proven misconduct. After careful consideration of movant's claim and of the nature and purpose of the underlying action, we conclude that such fees are not payable out of the assets of the receivership estate. Accordingly, the motion is denied in all respects.

The fees at issue are for services rendered from March 25, 1971 when the Court first acquired jurisdiction over

Opinion and Order 40,730 of Judge Cooper Denying Application for Counsel Fees, Dated May 22, 1974

the administration of the assets of Counsellors and Advisors until and including June 17, 1971, the date of the preliminary injunction. The fees arose out of defendants' efforts to resist the application of the SEC for injunctive relief and appointment of a receiver. Movant represented both corporate defendants, Counsellors and Advisors, as well as the individual defendants, J. Irving and Abraham B. Weiss, who were president and vice-president respectively of the corporate entities. The temporary restraining order was signed on March 25, 1971 which froze the assets of Counsellors and Advisors. Thereafter, by our order of April 2, 1971 the customers of Counsellors and Advisors were indemnified from any further depletion of their assets in defendants' possession. On June 11, 1971, after trial of the action, the Court held that injunctive relief was warranted and appointed a receiver to administer the remaining assets of Counsellors and Advisors. Specifically the Court found that defendants had committed the following fraudulent acts:

(a) Sale of unregistered securities in violation of the Securities Act §5(a) and (c), 15 U.S.C. §77e(a) and (c);

(b) Selling securities by means of untrue statements in violation of the Securities Act §17(a), 15 U.S.C. §77q(a); and

(c) Employing manipulative or deceptive devices in the sale of securities in violation of the Securities Exchange Act §10(b), 15 U.S.C. §78j(b) and Rule 17 CFR 240.10b5. See *SEC v. Capital Counsellors, Inc.*, 332 F. Supp. 291 (S.D.N.Y. 1971). The preliminary injunction was signed June 17, 1971.

We find the issue here raised is resolved by the application of the reasoning in a recent decision, *SEC v.*

Opinion and Order 40,730 of Judge Cooper Denying Application for Counsel Fees, Dated May 22, 1974

Alan F. Hughes, Inc., 481 F. 2d 401 (2d Cir.), cert. denied, 42 U.S.L.W. 3352 (Dec. 10, 1973). There the Securities Investor Protection Corporation (hereafter "SIPC") had applied for appointment of a trustee for the liquidation of a registered broker-dealer charged with various violations of the federal securities laws. That application was unsuccessfully opposed by defendant broker-dealer and its president. Defendants' counsel thereafter sought to recover fees for resisting the application from assets of the liquidated estate or alternatively from funds provided by SIPC. The Court denied recovery holding that resisting liquidation was not a "purpose of the liquidation proceedings" within the meaning of the Securities Investor Protection Act of 1970 (hereafter "1970 Act"). 15 U.S.C. §78fff(a) and (f)(2). Further, though it could so provide, Congress had not in fact authorized payment of such fees by an estate liquidated pursuant to the 1970 Act. The Court concluded that its decision did not deny defendants due process or equal protection inasmuch as the Constitution does not require the appointment of counsel in civil cases and, as is equally true herein, defendants suffered no deprivation of legal services. Finally, the Court found a compelling analogy to the Bankruptcy Act under which it has long been held that legal services in resisting a bankruptcy petition are not compensable thereunder.

> "Moreover, if the Constitution does not require exemption from a filing fee for an indigent who seeks to take advantage of the bankruptcy laws, see *United States v. Kras*, 409 U. S. 434, 93 S. Ct. 631, 34 L. Ed. 2d 626 (1973); it surely does not require that a brokerage firm resisting an application be entitled to have its attorneys paid out of the estate."

SEC v. Hughes, 481 F. 2d at 403.

Opinion and Order 40,730 of Judge Cooper Denying Application for Counsel Fees, Dated May 22, 1974

Though the *Hughes* case involved an interpretation of the 1970 Act, its reasoning is equally applicable to the instant proceeding. If legal services rendered in opposition to a bankruptcy proceeding are not compensable out of the bankrupt-estate, then clearly the services rendered herein in opposition to the SEC application for injunctive relief and receivership are also not compensable from the assets of Counsellors and Advisors.

Bankruptcy may result from ineptitude or misfortune without any imputation of fraud. Here the receivership was imposed not only because defendants were failing to meet their customer obligations but also because that failure resulted from fraudulent acts perpetrated by defendants in violation of the Securities Act and the Securities Exchange Act. See *SEC v. Capital Counsellors, Inc., supra.*

The purpose of these Acts was to achieve a high standard of business ethics in the securities industry and prevent fraud in the purchase and sale of securities so as to protect the public investor and minimize his losses. *SEC v. Capital Gains Research Bureau, Inc.*, 375 U. S. 180 (1963); *Zeller v. Bogue Elec. Mfg. Corp.*, 476 F. 2d 795 (2d Cir. 1973). The intendment of the 1970 Act was similarly to protect customers of broker-dealers who had fallen into financial difficulty and incapable of meeting their customer obligations: imputation of fraud to the broker-dealer is unnecessary. See *SEC v. Alan F. Hughes, Inc.*, 461 F. 2d 974 (2d Cir. 1972); *Lohf v. Casey*, 350 F. Supp. 356 (D. Colo. 1971). Clearly, public policy as enunciated in the *Hughes* case, 481 F. 2d 401, is unalterable in its position that defendants, found to have committed the fraudulent acts aforementioned, shall not be permitted to impose the burden of defending themselves upon customers and other creditors who have al-

ready suffered losses in excess of 4 million dollars. That defendant's attorneys failed to provide for adequate assurance of compensation other than through reliance upon a successful defense of the action is no reason for transferring their loss to the public.

The Acts which defendants were found to have violated provide for payment of attorneys fees in certain instances. See Securities Act of 1933 §11(e), 15 U.S.C. §77K(e); Securities Exchange Act of 1934 §§ 10(b) and 14(a), 15 U.S.C. §§ 78j(b) and 78n(a). Thus shareholders who have established a violation of the securities laws by their corporation and its officials should be reimbursed by the corporation or its survivor for costs of establishing the violation. *Mills v. Electric Auto-Lite Co.*, 396 U. S. 375 (1970); *Kahan v. Rosenstiel*, 424 F. 2d 161 (3rd Cir. 1970); *Wolf v. Frank*, 477 F. 2d 467 (5th Cir. 1973); *Feder v. Harrington*, 58 F.R.D. 171 (S.D.N.Y. 1972). Similarly where defendants have obtained dismissal of a complaint brought under the federal securities laws, they may be entitled to reimbursement if it is shown that the claim was devoid of merit. See *Klein v. Shields & Co.*, 470 F. 2d 1344 (2d Cir. 1972); *Katz v. Amos Treat & Co.*, 411 F. 2d 1046 (2d Cir. 1969).

The underlying rationale of these cases, as we interpret them, is that where prosecution or defense of an action under the federal securities laws has been in furtherance of the purpose of those laws—protection of the public investor—then the parties bearing the costs of such prosecution or defense are entitled to reimbursement. See *Mills v. Electric Auto-Lite*, *supra*, at 241; *Smolowe v. Delendo Corp.*, 136 F. 2d 231 (2d Cir. 1943). Applying that reasoning to the instant proceeding, we find that defendants' opposition to the SEC application in no way furthered the interests of their public investors.

Notice of Appeal

Although the professional services rendered were of high order and deserving of the legal fees requested, the cost of the opposition interposed here cannot be paid out of the receivership estate.

So Ordered:

New York, N. Y.
May 22, 1974

IRVING BEN COOPER
United States District Judge

Notice of Appeal.

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

[SAME TITLE.]

SIRS:

Notice Is Hereby Given that Conboy, Hewitt, O'Brien & Boardman hereby appeals to the United States Court of Appeals for the Second Circuit from the order of Hon. Irving Ben Cooper, U.S.D.J., entered in this action on May 22, 1974, denying the motion of Conboy, Hewitt, O'Brien & Boardman for payment of $20,000 in legal fees out of the assets of the receivership estate of Capital Counsellors, Inc. and Capital Advisors, Inc.,

for their services as attorneys for Capital Counsellors, Inc. and Capital Advisors, Inc., defendants in this action.

Dated: New York, N. Y.
July 22, 1974

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Member of the firm
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Services of three (3) copies of
the within Affidavit is
hereby admitted this 4th day
of August, 1974.

Ann Coughlin
Attorney for Defendant

Services of three (3) copies of
the within is
hereby admitted this day
of , 197

Attorney for